No. 12209

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDA MARY VOKAL, CHARLES DAVISON, and ROMEYN B. SAMMONS, Executors of the Estate of Paul F. Vokal, deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

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TABLE OF AUTHORITIES CITED

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Under Point I of Appellee's Brief (p. 5) it quotes from *Gifford v. Travelers Protective Assn. of America,* 153 F. 2d 209, page 211. This case involved fraternal benefit insurance contract. The only question involved was the validity of certain clause in contract limiting period for commencement of suit to a special period of six months. The suit was brought one year, lacking two days, after cause of action accrued. The plaintiff therein did not allege any fraud or waiver, and there was no doubt about the right of the insurance carrier to fix a time in the contract for filing claim or bringing action to recover on contract.

In the instant case appellee submitted no evidence, proof or affidavits which required appellant to file affidavits in

reply. Appellants' answer is specific and detailed, and required no support or amplification. It is in no sense general in its allegations.

At page 4 appellee quotes from *United States v. Maryland Casualty Company,* 147 F. 2d 423. This case involved merely the terms of a contractor's surety bond, question was whether "delay" caused by order of United States engineer constituted "labor and material" within the Act of Congress and the bond sued on. The Court found at page 424(1) no "material factual differences between the parties, as the affidavits offered leave the facts practically without dispute."

In the instant case the appellants allege their right to recover ALL MONEYS WITHHELD BY THEIR DEBTORS AND COLLECTED BY APPELLEE. They allege in their answer specifically and in detail fraud, malfeasance or a wilful misrepresentation on the part of the agents of the War Contracts Price Adjustment Board. In addition thereto they show that the retention of the moneys so withheld and collected constitutes fraud in itself for which they are granted a remedy for recovery, and quote in support of such contention from *Bull v. United States,* 295 U. S. 247, at page 260, Mr. Justice Roberts speaking for the Court:

> "Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. U. S. v. State Bank, 96 U. S. 30. *While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts to a fraud on the taxpayer's rights.* What

was said in the State Bank case applies with equal force to this situation. *An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice to refund. The form of the indebtedness or the mode in which it was incurred is immaterial . . . In these cases (cited) and many others that might be cited, the rules of law applicable to individuals were applied to the United States.* A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, . . . but it may be used by way of recoupment in an action by the United States arising out of the same transaction. (Pp. 34-36, Appellants' Brief) . . . This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action is timely." (Emphasis added.)

The Court further held in the foregoing case, that the Government gave him a right of credit for refund when it proceeded against him for collection of the income tax. The same principle of law is applicable here.

In *Doehler v. United States* (2d Cir.), 149 F. 2d 130, 135, the Court holds that a litigant has a right to a trial

> "where there is the slightest doubt as to the facts and a denial of the right is reviewable; but refusal to grant a summary judgment is not reviewable . . . "

This was an appeal from a summary judgment which was reversed, the appellate court stating that trial judges should exercise great care in granting motions for summary judgments. (App. Br. pp. 18-26.)

The burden is on the moving party and every doubt should be resolved against him. (App. Br. pp. 19, 22.)

Appellants set up cross claims as recoupment. Determination of their demands rather than independent action is favored. *Parmelee v. Chicago Eye Shield Co.,* 157 F. 2d 582, 585(1-3), 586(6-7). [T. R. pp. 24-27, Appellants' Second, Third and Fourth Defenses, p. 29, prayer for judgment g and h.]

Replying to Appellee's Point II of its brief: Appellants have not assailed generally the constitutional validity of the Renegotiation Act of 1943. Under Point Five, page 46 of Appellants' Brief, they deny the power of Congress to deprive the District Court of jurisdiction to review the action of the Board. They deny that the Congress has the power or authority to substitute for the constitutional courts any agency for the final determination of the existence of facts or law (p. 48). They cite several authorities in support thereof, and particularly that of *Crowell v. Benson,* 285 U. S. 22, 56, 59, 60, 63, 64. (App. Br. pp. 47-49.)

The appellee stresses appellants' failure to resort to the Tax Court of the United States, and at page 8 of its brief cites *Aircraft & Diesel Equip. Corp. v. Hirsch,* 331 U. S. 752, completely disregarding the express holding by that case that a subcontractor such as appellants might

and should have relief in actions against his contractor. At page 775, Mr. Justice Rutledge, speaking for the Court said:

> "In the first place, there can be no doubt of the availability or indeed the certainty and effectiveness of appellant's remedy at law upon its contracts against its customers claimed to owe it money under these agreements. *Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings* . . .
>
> "In addition there is special reason in the statutory provisions why that course should be followed rather than allowing the present suit. Appellant is, as we have pointed out, a subcontractor, not a contractor with the Government. While its suit could be instituted directly only against the contractor with whom it had dealt, nevertheless it is hardly conceivable that the Government would permit the suit to go to final judgment without intervention by it, or, at the least undertaking the responsibility for making the defense . . ."

The Court then quoted Section 403(c)(2) of the Renegotiation Act which indemnifies the contractor for all liability to the subcontractor, and said further:

> "In the face of this indemnity, the contractor becomes substantially a stakeholder as between the Government and the subcontractor, and the latter's suit against the contractor, if terminated favorably to the complainant, would obligate the Government to

indemnify or reimburse the contractor for the liability thus incurred . . ." (App. Br. pp. 27-29.)

The appellants proceeded in the manner approved in the foregoing authority. They brought two actions in the Superior Court of Los Angeles County against their contractors to recover the moneys withheld; the Government did not intervene, but it did appear in the cases and defend, and the present suit in the District Court and this appeal are the result of those two original actions in the Superior Court. Under the authority cited these actions in the Superior Court should be allowed to go to trial, and the injunction of the District Court restraining appellants from prosecuting such actions should be vacated, and the District Court should be reversed.

Respectfully submitted,

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